THE EMPLOYMENT LAW REVIEW

Tenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For the past nine years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. In updating the book this year, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 10 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This tenth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

This year, we proudly introduce our newest general interest chapter, which focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media in order to bring awareness to the prevalence of this issue in the workplace. In this new chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes impact the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border M&A continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2018 in nations across the globe, and this is one of our general interest chapters. In 2018, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulations to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other

factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter focused on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring-your-own-device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs, but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these five general interest chapters, this edition of *The Employment Law Review* includes 45 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associate, Vanessa P Avello, for her invaluable efforts to bring this tenth edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2019

Chapter 42

SOUTH AFRICA

Stuart Harrison, Brian Patterson and Zahida Ebrahim[1]

I INTRODUCTION

South Africa's Constitution[2] entrenches fundamental rights and contains several provisions that are relevant to employment and labour, which confer upon everyone the right to fair labour practices, provide for freedom of association for workers and employers, and the right to participate freely in the activities of a trade union or employers' organisation. Trade unions and employers' organisations have the right to form and join federations and to engage in collective bargaining. The Constitution provides for the enactment of national legislation to, *inter alia*, regulate collective bargaining, and the legislation so enacted is the Labour Relations Act No. 66 of 1995 (LRA).

The LRA also provides for resolution of labour disputes through, *inter alia*, the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), industry bargaining councils, the Labour Court and the Labour Appeal Court (LAC), which is, in principle at least, the final court of appeal for labour matters. However, where the dispute involves a constitutional issue, or the Constitutional Court is of the view that a matter raises an arguable point of law of general public importance which ought to be considered by that court, it is still possible to take the matter to the Constitutional Court. Employees can also enforce contractual employment rights in the normal civil courts.

The LRA provides protection for employees against unfair dismissal and unfair labour practices, with further guidelines supplied in Codes of Good Practice. The LRA extensively regulates dismissals on the basis of the operational requirements of the employer (retrenchments), and the rights of employees and the obligations of employers in the context of the transfer of a business (or part of a business) as a going concern.

Minimum conditions of employment are regulated by the Basic Conditions of Employment Act No. 75 of 1997 (BCEA). The BCEA applies to all employers and employees except 'soldiers and spies' and unpaid volunteers working for charity. The BCEA regulates working time, leave, particulars of employment and the keeping of records regarding remuneration, termination of employment (notice and severance pay), and the prohibition of child and forced labour. It provides for basic conditions to be varied in different ways. For example, a particular sector or industry can regulate its own terms via a bargaining council agreement, which then takes precedence over the BCEA (subject to some limited exceptions). A bargaining council comprises representative employers and unions in the

1 Stuart Harrison, Brian Patterson and Zahida Ebrahim are directors at ENSafrica. Susan Stelzner was also a director of ENSafrica. She sadly passed away on 5 January 2011 but this chapter continues to reflect her invaluable contribution and it remains dedicated to her memory.

2 The Constitution of the Republic of South Africa, 1996.

industry concerned. In addition, the Minister of Labour (the Minister) may make sectoral determinations setting basic conditions for a specific sector and area, a number of which have already been made. National minimum wage legislation setting minimum wages is in effect as of 1 January 2019.

Discrimination and affirmative action issues are regulated by the Employment Equity Act No. 55 of 1998 (EEA). The Occupational Health and Safety Act No. 85 of 1993 (OHSA) imposes on all employers a general duty to provide and maintain a working environment that is safe and without risk to employees' health. In addition, there are a number of specific regulations published under the OHSA. Work-related injuries and illnesses are covered by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993.

Unemployment benefits are regulated by the Unemployment Insurance Act No. 63 of 2001 and the Unemployment Insurance Contributions Act No. 4 of 2002.

Skills development in the workplace is regulated by the Skills Development Act No. 97 of 1998 and the Skills Development Levies Act No. 99 of 1999, which requires compulsory contributions by employers to a statutory fund with the opportunity for employers to get refunds against the contributions if they implement workplace skills development plans and the like.

Save for a section regulating the registration of private employment agencies, the provisions of Employment Services Act No. 4 of 2014 (ESA) came into effect on 9 August 2015. The purpose of the ESA is to increase productivity within South Africa, decrease levels of unemployment, and provide for the training of unskilled workers. While the ESA has various mechanisms for improving employment levels in the country and training the workforce, it remains to be seen whether these mechanisms will fulfil their legislative objective. Retirement funding and provision for medical insurance in South Africa is private unless regulated under a bargaining council agreement.

The employment of foreign nationals who are not asylum seekers, refugees or permanent residents is governed by the Immigration Act No. 13 of 2002 (the Immigration Act) as amended and the Regulations published pursuant thereto on 26 May 2014, as well as various practice directives issued by the Department of Home Affairs that influence the execution and application of the law.

II YEAR IN REVIEW

The past year saw the Constitutional Court decriminalise the private use of cannabis, which in turn has employers asking many questions about testing employees at work for being under the influence of the drug. This new development will need careful navigation from employers and employees alike.

In November 2018, President Cyril Ramaphosa signed into law four new bills, namely, the National Minimum Wage Bill, the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill and the Labour Laws Amendment Bill.

The National Minimum Wage Act introduces a new national minimum hourly wage that trumps sectoral determinations and restricts employers' ability to unilaterally change terms and conditions of employment or working hours. It also introduces a minimum daily wage and an exemption procedure for employers that are unable to comply with the national minimum wage, and provides for increases to the minimum wage.

The Labour Relations Amendment Act introduces measures aimed at trying to curb protracted or violent strikes, for example via advisory arbitration panels that can be appointed

to facilitate the resolution of unresolved disputes, the prohibition of pickets without picketing rules in place (CCMA commissioners will have the power to establish rules where the parties are unable to agree) and provisions for mandatory secret ballots of members by trade unions before embarking on strikes.

The Basic Conditions of Employment Amendment Act introduces new forms of leave for employees namely, parental leave of 10 days, adoption leave of 10 weeks and commissioning leave (where a surrogate mother is involved) of 10 weeks.

During 2017, the CCMA ruled that certain Uber drivers were employees of Uber's South African subsidiary (Uber SA) and that once a driver was 'deactivated', it was essentially an unfair dismissal. However, in 2018 the Labour Court set aside the CCMA ruling and held that, in the absence of any contractual arrangements between Uber SA and the Uber drivers, the Uber drivers were not employees of Uber SA and, therefore, had no right to refer an unfair dismissal dispute to the CCMA against Uber SA. The drivers had contracts with Uber BV, a Dutch-registered Uber company, but Uber BV had not been sued by the drivers and whether the Uber drivers were employees of Uber BV or whether they were independent contractors of Uber BV is a matter that remains undetermined.

The most significant changes affecting foreign nationals are the lifting of the blanket ban on asylum seekers applying for a change of status or permanent residence in South Africa and the proposed relaxation of travel rules applicable to minors travelling to South Africa.

III SIGNIFICANT CASES

i The cannabis judgment

In *Minister of Justice and Constitutional Development and Others v. Prince*, *National Director of Public Prosecutions and Others v. Rubin* and *National Director of Public Prosecutions and Others v. Acton and Others*,[3] the Constitutional Court considered whether it should confirm the decision of the High Court that declared various provisions of the Drugs and Drug Trafficking Act 1992 and of the Medicines and Related Substances Control Act 1965 unconstitutional, in so far as they prohibit the use of cannabis by an adult in a private dwelling and where the possession, purchase or cultivation of cannabis is for personal consumption by an adult. The Constitutional Court had to determine whether the various impugned statutory provisions infringed the constitutional right to privacy and, if so, whether this limitation of the right to privacy was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The Constitutional Court accepted that most of the impugned provisions infringed the right to privacy and that this limitation of the right to privacy could not be justified to the extent that it is inconsistent with the right to privacy provided for in Section 14 of the Constitution. It emphasised the importance of the 'individual's intimate personal sphere of life' and that no justifiable limitation thereof can take place. The Constitutional Court therefore issued a declaration that the impugned provisions were invalid to the extent that they made the use of cannabis in private by an adult person for his or her own consumption a criminal offence; and to the extent that they prohibited the cultivation of cannabis by an adult for his or her own consumption in private. This order was suspended for a period of

3 [2018] ZACC 30.

24 months in order to enable Parliament to rectify these constitutional defects. However, it also granted interim relief pending Parliament's amendments to the impugned statutory provisions. The Constitutional Court summarised the interim relief granted as follows:

a an adult person may use or be in possession of cannabis in private for his or her personal consumption in private;

b the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons is not permitted;

c the use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted; and

d the cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence.

Importantly, the Constitutional Court removed the High Court's limitation that the use, possession or cultivation of cannabis is restricted to a person's 'home' or 'private dwelling'. The Constitutional Court preferred the use of the words 'in private' for purposes of use and possession of cannabis, and ruled that cannabis can be cultivated in a 'private place' for personal consumption.

ii Assign Services (Pty) Ltd v. National Union of Metalworkers of South Africa and others[4]

In this case, the Constitutional Court dealt with the question of whether a client who is deemed to be the employer of an assignee in terms of Section 189A becomes the sole employer of the assignee or whether the temporary employment service (TES) also remains an employer of the assignee. The Constitutional Court has now provided certainty in a majority decision of nine judges who came to the conclusion that, after the deeming provision takes effect, there is only one employer, the client. In 2015, Assign Services, a TES, placed 22 workers with Krost Shelving and Racking (Pty) Limited, many of whom were members of the National Union of Metalworkers of South Africa (NUMSA). The workers rendered services to Krost for more than three months and were ultimately working on a full-time basis. Assign Services' view was that Section 198A(3)(b) created a dual employer relationship, while NUMSA argued that the Section created a sole employer relationship. The CCMA supported NUMSA's sole employer interpretation of the section.

On review, the Labour Court held that a proper reading of the section could not support the sole employer interpretation – instead, it held that Section 198A(3)(b) created a dual employment relationship, in which both the TES and the client have rights and obligations in respect of the workers. On appeal by NUMSA, the LAC agreed that the sole employer interpretation best protected the rights of placed workers and promoted the purpose of the LRA. The Constitutional Court ultimately held that the purpose of Section 198A must be contextualised within the right to fair labour practices as set out in Section 23 of the Constitution as well as the purpose of the LRA as a whole. The majority found that, on an interpretation of Sections 198(2) and 198A(3)(b), for the first three months the TES is regarded as the employer and once the three months have lapsed the client becomes the sole employer. The majority found that the language used by the legislature in Section 198A(3)(b)

4 [2018] ZACC 22.

is plain and that when the language is interpreted in the context, it supports the sole employer interpretation. Consequently, the Constitutional Court granted leave to appeal but dismissed the appeal with costs.

iii Rustenburg Platinum Mine v. SAEWA obo Meyer Bester and Others[5]

In this case, the Constitutional Court dealt with the question of whether an employee referring to a colleague as a 'swart man' (black man), in the circumstances, constituted misconduct justifying dismissal. The employee in this matter was employed by the Rustenburg Platinum Mine. He had been allocated a specified parking bay at his place of work. In April 2013, the manager in charge of allocating parking bays, allocated the adjacent parking bay to an employee of a subcontractor at the mine. Though parking in a limited space was possible, it was difficult to reverse into it and the employee became concerned that the vehicles may be damaged in the process. He decided to take the matter up with the manager in an effort to arrange for the other vehicle to be parked elsewhere. The employee made repeated efforts to raise the issue without any success. On 24 April 2013, an incident occurred that led to the employee's dismissal as a result of alleged racist comments made by him. The employee challenged his dismissal in the CCMA. At the CCMA arbitration, the version proffered by the mine's witnesses was that the employee stormed into a meeting with other employees convened by the manager and said, in a loud and aggressive manner, that the manager must 'verwyder daardie swart man se voertuig' ('remove that black man's vehicle') and that if he did not do so, he would take the matter up with management. The CCMA accepted that employee had used the term 'swart man' but came to the conclusion that the term had been used in a descriptive sense rather than a derogatory sense. On review, the Labour Court set aside the CCMA's finding. It accepted the version of events described by the employer's witnesses and held that the remark had racist connotations. The LAC, in turn, disagreed with the Labour Court's approach and accepted that the dismissal on this ground had been unfair. This decision was then taken on appeal to the Constitutional Court.

The Constitutional Court found that:

a in interpreting 'swart man', the reality of South Africa's past of institutionally entrenched racism cannot be ignored. Therefore, the starting point for interpreting the use of 'swart man' cannot be presumed to be from a neutral context; and

b the term 'swart man' was racially loaded and, hence, derogatorily subordinating.

In particular, the Constitutional Court held that:

> *. . . racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination. In both instances, such prejudices are evident in the workplace where power relations have the ability 'to create a work environment where the right to dignity of employees is impaired'.*

5 [2018] ZACC 13.

It went on to hold that:

> *Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The Constitutional Court emphasised that 'South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations.'*

In this regard, the Constitutional Court found that the employee had shown no remorse. He had persistently denied ever using the term 'swart man', and, in doing so, was dishonest. Such dishonesty weighed heavily against him when considering sanction. The Constitutional Court therefore held that 'by his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme'. It further held that the test to be applied in determining whether the term 'swart man' was racist and derogatory 'is whether objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning'.

iv Malatji v. Minister of Home Affairs and Another[6]

In this case, the LAC had to determine when *mora* interest, the interest accrued on overdue payment, should begin running, in circumstances where the Labour Court had ordered the substitution of an arbitration award granting retrospective reinstatement with an order for the payment of compensation, but had made no provision for the timing of interest. In essence, the LAC was required to determine whether *mora* interest should be calculated from the date of the initial arbitration award or from the date on which the arbitration award was reviewed and set aside by the Labour Court. In this matter, the Department of Home Affairs (the Department) dismissed its chief director of legal services after a disciplinary hearing where he was found guilty on various charges. Subsequently, an unfair dismissal dispute was referred to the General Public Services Sector Bargaining Council (GPSSBC). On 14 August 2006, the GPSSBC issued an arbitration award retrospectively reinstating the chief director of legal services and ordering the Minister of Home Affairs (the Minister) and the department to pay him compensation equivalent to 12 months' remuneration. The GPSSBC's award was subsequently varied on 30 August 2006. The Minister and the Department launched a review application in respect of the GPSSBC's award. On 2 April 2013, the Labour Court reviewed and set aside the GPSSBC's award, substituting the relief in the award with compensation equivalent to nine months' salary. Thereafter, the substituted award was made an order of the Labour Court; however, no order was made in relation to the payment of interest.

On 24 April 2013, the Department paid the principal compensation amount and interest from 2 April 2013, the date of the Labour Court judgment. However, the chief director of legal services insisted that he be paid interest from 1 September 2006, the date on which the GPSSBC award was varied. He contended that the effect of the Labour Court's order in substituting the award was that he was entitled to the payment of interest from the date of the arbitration award and not the judgment. He relied on Section 143(2) of the

6 [2018] ZALAC 23.

LRA, which provides that: 'If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.'

An application was launched in the Labour Court for a declaratory order that the Minister and the Department were liable to pay the chief director of legal services interest from date of the variation of the award until 24 April 2013, which was the date on which the department paid interest on the principal amount. Harper AJ dismissed this application, reasoning that Section 143(2) of the LRA does not address a circumstance where an arbitrator's award is substituted in its entirety with an order of the Labour Court. The matter was taken on appeal to the LAC, which confirmed that, as set out by the Labour Court in *Top v. Top Reizen CC*, Section 143(2) of the LRA does not depart from the common law position that interest begins running from the date on which the debtor's claim is ascertained. In this regard, the LAC noted that the question that needed to be answered in this matter was whether a debtor's liability for the payment of interest can be said to have arisen where the validity of an arbitration award is subject to challenge through a review process. In this regard, the LAC pointed out that:

a *mora* interest can only be levied and begin to accrue once the amount of compensation is ascertained or easily ascertainable;

b where an award is subject to review, it cannot be said that the quantum is readily ascertainable, nor is the time for performance by the debtor fixed; and

c consequently, there is no obligation on the debtor, in such circumstances, to pay the debt.

With reference to the Constitutional Court judgment in *Myathaza v. Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others*, the LAC noted that:

a while Section 145(3) of the LRA empowered the Labour Court to stay enforcement of an award pending a review application, it did not follow automatically that the award was enforceable, because if awards were to be so enforced, applicants in review proceedings would be prejudiced and exposed to irreparable harm in the event that the award is set aside; and

b arbitration awards constitute administrative action and are not claims capable of being enforced.

Rather, the last step in the adjudication of unfair dismissal disputes is either a Labour Court judgment, where the Court has jurisdiction in respect of such a dispute, or a Labour Court order making an arbitration award an order of court. To the extent that the GPSSBC award was for reinstatement, the LAC held it did not constitute a debt, which has been authoritatively defined as being an obligation to pay money or deliver goods or to render service by a judgment debtor. As a result, it held that interest in this instance could not have accrued from the date of the issue of the award and that, in any event, the Labour Court's order awarding the chief director of legal services compensation equivalent to nine months' salary substantially altered the original reinstatement award made by the GPSSBC. Therefore, the LAC held, it could not be said that the minister and the department were in *mora* from the date of issue of the award or its subsequent variation, but rather only from the date of the Labour Court judgment. The LAC held that the consequence of its judgment was that a judgment debtor would only be entitled to the payment of interest *a tempore*

morae on an unliquidated claim from the date of an arbitration award, if the award is not challenged through a review process, or from the date of a review judgment pursuant to a court's determination of the quantum of the claim. Accordingly, the LAC only partially upheld the appeal in that it set aside and substituted the Labour Court's order, but only to the extent that interest on the compensation award was to begin running from the date of his judgment, being 2 April 2013, to the date of final payment.

v Minister of Home Affairs v. Ahmed

In a significant win for asylum seekers in South Africa, the outcome of the Supreme Court of Appeal decision in *Minister of Home Affairs v. Ahmed*, which held that holders of asylum seeker permits in terms of Section 22 of the Refugees Act 130 of 1998 are precluded from applying for status under the Immigration Act while they are within South Africa, was successfully challenged in the Constitutional Court.

The Director General of the Department of Home Affairs' blanket ban on asylum seekers applying for visas without provision for an exemption application under Section 31(2)(c) of the Immigration Act 13 of 2002 was declared inconsistent with the Immigration Act 13 of 2002 and invalid. The prohibition on asylum seekers applying for permanent residence permits while inside South Africa was also declared inconsistent with Regulation 23 of the Immigration Regulations 2014, and thus invalid.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

The existence of an employment contract is not a prerequisite for an employee to qualify for statutory employment rights. The definition of an employee under most South African employment legislation is wide enough to include persons (excluding independent contractors) who assist in carrying on or conducting the business of the employer even though they may not be formally employed by the employer. Most employees in South Africa are, however, employed under employment contracts.

The BCEA obliges employers to provide their employees with written particulars of their employment conditions once the employee commences employment. Signatures on a contract are not legally required, subject to two limited exceptions, namely for written employment contracts under the Merchant Shipping Act No. 57 of 1951 and contracts relating to learners (i.e., apprentices) under the Skills Development Act.

The conditions of employment provided for under the BCEA constitute the basic terms of any employment relationship except to the extent that any other law or terms of the employment contract provide for more favourable terms, or where the basic condition has been varied in terms of the BCEA. Collective agreements, where applicable, can also vary the terms of employment contracts between the employers and employees who are bound by them.

Under South African law, employers and employees are generally free to conclude their contract of employment either for a fixed term or an indefinite period. The LRA places certain restrictions on the use of fixed-term contracts for employees earning below the BCEA earnings threshold.[7]

7 As of 27 November 2018, this is 205,433.30 rand per annum.

Parties to an employment contract can only amend the contract by agreement. Agreement is obtained either through negotiation or, if this fails, after taking certain procedural steps parties can resort to industrial action (i.e., a strike in the case of employees or a lockout in the case of employers) aimed at compelling the other party to agree.

It is mandatory that all offers of employment to foreigners who require work visas be made subject to the employee procuring such a work visa before commencing employment.

ii Probationary periods

Probationary periods are permitted for newly hired employees in order to afford the employer an opportunity to evaluate the employee's performance and suitability for employment before confirming his or her appointment. An employer must still have a fair reason and follow a fair procedure before effecting the dismissal of a probationary employee. The minimum notice periods for termination of employment described in Section XII.i also apply to employees on probation.

iii Establishing a presence

A foreign employer can hire employees and engage independent contractors in South Africa without being required to set up a local entity. A foreign employer may, however, be required to register as an external company (a branch) with the South African Companies and Intellectual Property Commission if it conducts business within South Africa as contemplated by the South African Companies Act No. 71 of 2008. A company is deemed to be conducting business in South Africa if it is (1) a party to one or more employment contracts within South Africa, or (2) engaging in a course of conduct that would 'lead a person to reasonably conclude that the company intended to continually engage in business' within South Africa.[8]

A non-resident employer is not obliged to withhold employees' tax from remuneration (provided that it does not have a 'representative employer', as defined in South Africa). The employees themselves will be required to settle their tax liabilities in respect of the remuneration they receive from the non-resident employer for the services that they render in South Africa. This will be done through provisional tax payments.

If a foreign employer appoints a South African resident agent to pay remuneration on behalf of the foreign employer, the South African agent will be regarded as a representative employer of the foreign employer in South Africa and will be required to register as an employer with the South African Revenue Service and withhold employees' tax from remuneration paid to employees of the foreign employer.

A foreign employer will be liable for income tax on its South African-sourced income. However, if there is a double taxation agreement in place between South Africa and the jurisdiction within which the foreign employer is resident (for the purposes of the double taxation agreement), and the income of the foreign employer comprises business profits, then the double taxation agreement would allocate taxing rights to the country in which the foreign employer is a resident, unless the foreign employer carries on business in South Africa through a permanent establishment. Most of South Africa's double taxation agreements are based on the OECD Model Tax Convention on Income and Capital (the Model Tax Convention).

The existence of a permanent establishment is determined with reference to Article 5 of the Model Tax Convention. Generally, however, what is required for permanent establishment

8 Section 23(2) of the Companies Act.

is a fixed place of business through which the business of an enterprise is wholly or partly carried on. There must be a fixed location or facility with a certain degree of permanence that is used to conduct business activities of the enterprise, and it must be utilised on a regular basis for business operations. Generally, business is regarded as being carried out through the employees of the enterprise, but a business may also be carried on through agents or other representatives of the enterprise, particularly where those representatives are dependent on the enterprise.

Therefore, if employees of a foreign employer spend significant periods of time in South Africa and carry on the business of the foreign employer in South Africa, these employees may create a permanent establishment for the employer in South Africa. If so, then the profits of the foreign employer that are attributable to the permanent establishment may also be taxed in South Africa.

If a South African-resident company employs employees in South Africa, whether the employees are foreign or local, employees' tax must be deducted from remuneration at source and the employer is responsible for reporting and withholding the employees' tax. Employers are required to provide few statutory benefits.

V RESTRICTIVE COVENANTS

Restraint of trade (i.e., non-compete or restrictive covenant) clauses can be included in employment contracts. Such clauses are in principle valid and enforceable and, as such, many restraints are enforced in South African courts every year. Nevertheless, when the employer seeks to enforce restraint provisions, the courts retain discretion as to whether to enforce the restraints and they will not enforce them if, in a particular case, such enforcement would be unreasonable or contrary to the public interest.

The reasonableness of a restraint is judged both on the broad interests of the public and the interests of the contracting parties themselves. Reasonableness as between the parties themselves depends on many factors, the most important of which is whether the employer has a proprietary interest that may legitimately be protected by means of a restraint agreement. Proprietary interests include confidential information and customer connections. The geographical area and duration of the restraint must also be reasonable.

The restraint may also operate in combination with garden leave in appropriate cases. In such cases, when assessing the reasonableness of the restraint period, the period of garden leave will be taken into account.[9]

It is not a prerequisite for the employer to financially compensate the employee in exchange for the employee undertaking restraint of trade obligations, although where such payments are made, this may enhance the enforceability of the restraint.

VI WAGES

i Working time

Generally, no employee may work more than 45 ordinary hours a week and nine hours a day if he or she works a five-day week. Alternatively, the employee may not work more than eight

9 *Vodacom (pty) Ltd v. Motsa and another* 2016 (3) SA 11 6 (LC).

hours a day if he or she works a six-day week. Total working hours may not exceed 12 hours a day. Wage-regulating measures specific to industries can have different provisions regulating working hours.

Night work (i.e., work performed after 6pm and before 6am the next day) may only be done with the employee's consent and he or she must be compensated with an allowance, which may be a shift allowance or a reduction of normal working hours, and transport must be available between his or her residence and the workplace at the commencement and conclusion of the shift. If employees perform night work on a regular basis (i.e., work for longer than one hour after 11pm and before 6am at least five times a month or 50 times a year), the employer must inform them of health and safety hazards associated with night work and of their right to request a medical examination at the employer's expense. If a regular night worker suffers from a health condition associated with the performance of night work, the employer must transfer the employee to suitable day work within a reasonable time if it is practicable to do so.

ii Overtime

Employees generally enjoy the following statutory overtime benefits (excluding those who are not senior managerial employees, sales staff who travel to customers' premises and regulate their own working hours, employees who work for fewer than 24 hours a month, or employees who earn above the BCEA earnings threshold):

a An employer can only require an employee to work overtime where the employee's agreement to do so has been obtained. If the employee's agreement is obtained on commencement of employment or within three months thereof, the consent shall lapse after 12 months and must be secured again by the employer, after which the consent does not lapse. An employer must pay an employee at least one-and-a-half times the employee's wage for overtime worked or grant the employee paid time off (e.g., 90 minutes off for every 60 minutes overtime worked).

b Employees are not permitted to work more than 10 hours overtime a week or three hours overtime in a day if they work a nine-hour day.

The National Minimum Wage Bill was signed into law on 23 November 2018, and came into effect on 1 January 2019. A national minimum wage of 20 rand per hour (with slightly lower minimums for farm and domestic workers) has been approved and will be reviewed annually (by a yet-to-be-appointed commission).

VII FOREIGN WORKERS

The employment of non-South African citizens who are not asylum seekers, refugees or permanent residents (foreign workers) is governed by the Immigration Act 2002, as amended, as well as the regulations thereto.

The Act and regulations impose obligations on any person or organisation that employs a foreigner, regardless of the business's size or number of employees, although stricter compliance is required of any employer with more than five employees or that has been found guilty of a prior offence under the Act.

An authorisation to work is required irrespective of the duration for which services will be rendered within South Africa. A business visitor's visa is suited to temporary placements of less than 90 days. Where a traveller, such as an academic, business person or frequent visitor,

has established himself or herself as a *bona fide* frequent business visitor, they may be issued with a two- to three-year multiple entry visa, usually for visits of 30 days. Longer placements require a temporary residence work visa such as an intra-company transfer, a general work visa, a critical skills visa or corporate worker visa, or another appropriate visa authorising the work. There is no restriction on the number of foreign workers that an employer may employ or on the number of categories under which work visas may be applied for. Nonetheless, the work visa process guards against employing foreign workers in positions that can be filled by local people.

By way of example, the regulations provide that a company wishing to obtain a corporate visa or a business visa must have a workforce that is made up of at least 60 per cent South Africans, and that an application for a general work visa must include a certificate from the Department of Labour confirming that, despite a diligent search, the employer has been unable to find a South African citizen or permanent resident with equivalent qualifications and skills or experience. The Department of Labour's application process for such certification includes the submission of proof of advertisement of the position as well as a letter of motivation from the employer and from a recruitment agency detailing the labour market test, and disclosing the details of all unsuccessful applicants for the position and justifying the need to employ a foreign worker in that position.

No labour market testing is required when applying for a critical skills visa, which facilitates applications for foreigners who meet the minimum qualifications and experience listed on the critical skills list published in terms of the Regulations.

Similarly, no labour market testing is required when applying for an intra-company transfer work visa. However, an undertaking must be given to develop a skills transfer plan. Many foreign missions insist on the filing of a skills transfer plan, which identifies the South Africans to whom skills will be transferred.

There is no general legislative cap on the period for which a foreign worker may be employed in aggregate, although the Immigration Act does provide maximum periods for which certain categories of work visas may be granted. Intra-company transfer work visas may be issued for a maximum of four years and cannot be renewed. Upon expiry of the visa, the holder must depart from South Africa. If they wish to apply for a different category of visa, they must bring the application abroad.

In general, work visa holders become eligible to apply for permanent residence after holding a temporary residence work visa for a continuous period of five years, provided that they have received a permanent offer of employment. Critical skills holders may apply for permanent residence sooner. Although not legislated, the Department of Home Affairs would usually insist on proof of work experience in the relevant area of skill. Critical skills holders who have obtained a qualification listed as a critical skill in South Africa are also able to apply for permanent residence on the basis of such qualifications without the need to obtain evaluation of their qualifications from the South African Qualifications Authority or to demonstrate prior work experience.

Any foreign worker needs to obtain a work visa to render services in South Africa irrespective of the time frame for which they are required to render services locally and notwithstanding the fact that they may be employed through a foreign entity. Foreign workers and their employers can be fined or jailed, or both, for non-compliance with their obligations in this regard.

South African employment laws are of universal application for employees that fall within their jurisdiction. They therefore apply to foreign workers working in South Africa, even if they are working illegally in contravention of their visa status.

To ensure regulatory compliance, an employer in South Africa must maintain documentary records for each foreign employee for two years after the termination of employment. The employer must also report to the authorities the termination of a foreign worker's employment and any breach by the worker of his or her status. Employers must also make a reasonable effort in good faith to ensure that they have no illegal foreigners in their employ and to ascertain workers' status or citizenship.

VIII GLOBAL POLICIES

Employers are under no legal obligation to have written internal discipline rules and individual employers may decide whether they want to establish written rules to regulate conduct in the workplace.

In general, an employer does not require the approval or agreement of its employees or their representative body when deciding to introduce discipline rules, unless the rules form part of their employment contracts and the employer wishes to amend the rules. Approval and agreement may also be required where there is a collective agreement between the employer and the representative body stipulating that employees or their representative body must approve or agree to discipline rules before the rules may be introduced or amended. There is also no requirement for the rules to be filed with or approved by any government authorities but such disciplinary rules must be lawful and fair.

Although there are no mandatory discipline rules, issues of discrimination and sexual harassment are prohibited by specific legislation, most notably the EEA and codes published pursuant to the EEA. Employers must also report acts of corruption to the authorities.

There is no requirement that the rules governing discipline in the workplace be signed. It is nonetheless good practice to get employees to sign some form of acknowledgement that they are aware of the existence of the rules and have been given an opportunity to familiarise themselves with them. This may be done electronically.

The rules should be accessible to all employees and, if possible, copies of the rules should be given to all employees. If this is not possible, then copies should be available from designated persons, such as human resources managers, for inspection by employees. An intranet site is insufficient if the employees do not have access to it or do not know how to access it.

Individual employers are free to decide whether to incorporate the disciplinary rules into employees' employment contracts, but generally it is not advisable to do so. In cases where the disciplinary rules are incorporated into the employee's contract of employment, any minor breach of the rules will constitute a breach of contract that may be actionable. In addition, the rules will then become part of the employees' terms and conditions of employment and may not be changed without the employees' consent.

IX TRANSLATION

There is no legal requirement that employment-related documents be translated, unless the employee is not able to understand them, in which case the employer should ensure that the contents of the documents are explained to the employee in a language and in a manner that the employee understands.

There are no penalties if the document is not translated. However, if it is not translated (in circumstances where it is required as described above), the risk is that the employer may be directed by the Department of Labour to translate the documents or they may be unenforceable against the employee in question.

X EMPLOYEE REPRESENTATION

Employees are permitted to form and join a registered trade union of their choice. Employees, through their trade unions, are also permitted to establish workplace forums in their workplace where the employer employs more than 100 employees to consult on numerous defined workplace issues. Such workplace forums are rare.

A majority union in a workplace in which at least 10 of its members are employed may elect union representatives from its members in accordance with the following ratio:

a 10 members in the workplace: one representative;

b more than 10 members: two representatives;

c more than 50 members: two representatives for the first 50 members plus one representative for every additional 50 members (up to a maximum of seven);

d more than 300 members: seven representatives for the first 300 members plus one representative for every additional 100 members (up to a maximum of 10);

e more than 600 members: 10 representatives for the first 600 members plus one representative for every additional 200 members (up to a maximum of 12); or

f more than 1,000 members: 12 representatives for the first 1,000 members plus one representative for every additional 500 members (up to a maximum of 20).

Unions that do not have majority representation may nonetheless elect union representatives from their members if a collective agreement is concluded with the employer concerned that allows for this. The constitution of the trade union (together with any constraints and obligations that may exist in terms of a collective agreement, if any) will govern the nomination, election, term of office and removal from office of the representatives. It will also regulate the holding of meetings and the issues related thereto. In terms of the recent amendments to the LRA, any registered trade union that represents a 'significant interest' or a 'substantial number of employees' in the workplace may be entitled to be recognised for organisational rights, irrespective of a collective agreement to the contrary.

Representatives have the right to assist and represent employees in grievance and disciplinary proceedings, to monitor the employer's compliance with labour laws and any collective agreements, and to report any contraventions of these laws and agreements. They also have the right to perform any other functions as agreed with the employer and to take reasonable time off work for trade union activities. Representatives may not be discriminated against in any way, or dismissed, for their involvement in trade union activities. However, representatives remain employees of the employer, and generally remain subject to its rules on discipline and its other workplace rules.

Depending on the level of representation of the union, an employer must allow it access to the workplace in order to recruit members, communicate with them, hold meetings, and otherwise serve them and grant stop orders due to the union from the employees' wages.

XI DATA PROTECTION

i Requirements for registration

Comprehensive legislation regulating data protection was published in 2013 in the form of the Protection of Personal Information Act 4 of 2013 (POPIA), but this has not fully come into effect. The many substantive obligations provided for in the POPIA are thus not yet binding or applicable, and it is unknown when they will come into operation, although the likely date appears to be closer than was previously the case given the development referred to below. Once the substantive provisions of the POPIA are made effective, companies will be given a one-year grace period to comply with its provisions, which may be extended. Once operative, the POPIA will place restrictions on what information may be collected from employees and applicants and processed by employers. The POPIA does not require employers to register with a data protection agency or other government body, but an employer can only collect and store personal information about its employees if it has notified the Information Protection Regulator and the employees, and it is necessary or related to a lawful and permitted purpose under the legislation. In September 2017 draft regulations were published for public comment. The final regulations were published on 14 December 2018.

Personal information may only be collected by an employer directly from and with consent of the employee, who must be informed of the purpose of any collection and who the intended recipients are once the information is collected. Personal information should not be kept for longer than necessary to achieve the (permitted) purpose for which it was collected and it must be distributed in a way that is compatible with the purpose for which it was collected. The employer must take reasonable steps to ensure that the information is accurate, up to date and complete.

Under the POPIA the employer must ensure that the employee's information is protected against risks of loss, damage destruction or unauthorised access. The employee must also be allowed to access his or her personal information and can demand that the information be corrected if it is found to be inaccurate.

ii Cross-border data transfers

The POPIA prohibits cross-border (and onward) transfers of personal information to countries that do not have substantially similar protections for the information (except under limited circumstances). Notification of transfers of sensitive personal information or the personal information of children must be given to the Information Regulator, and an employer must obtain the Information Regulator's prior authorisation before processing such information. The employee's consent to the transfer is generally required. The transfer must also be necessary under contractual arrangements involving the employee. Authorisation from the Information Regulator need only be obtained once and not each time that personal information is received or processed, except where the processing departs from that which has already been authorised.

iii Sensitive data

The POPIA considers the following information to be 'special personal information' for which additional protections are required: information concerning children; religious or philosophical beliefs; race or ethnic origin; trade union membership; political persuasion; health, sex life or biometric data of a data subject; and criminal behaviour in certain instances.

This special personal information may not be processed by an employer unless specifically permitted under exemptions provided for in the legislation. An example of an exemption would be the processing of racial information because the employer is required to comply with laws designed to protect or advance persons from groups historically disadvantaged by unfair discrimination (in terms of the EEA).

iv Background checks

Background checks are generally permitted provided they do not involve checks that amount to unfair discrimination under the EEA.

A Code of Good Practice issued under the EEA stipulates that an employer should only conduct an integrity check – such as contacting credit references and investigating whether the applicant has a criminal record – if this is relevant to the requirements of the job. The National Credit Act No. 34 of 2005 also stipulates that a credit bureau can only issue a credit report to a prospective employer when the employer is considering the candidate for a position that requires trust and honesty and entails the handling of cash or finances, and only with the prior consent of the candidate.

Medical testing is only permitted if legislation permits or requires it or if it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. Testing an employee for his or her HIV status is prohibited unless determined to be justifiable by the Labour Court. Psychological testing and other similar assessments are also prohibited unless the test has been scientifically shown to be valid and reliable, and that it can be applied fairly to all employees and is not biased against any employee or group of employees.

The Immigration Act and regulations thereto provide that medical reports and chest X-rays must be submitted in support of temporary and permanent residence visa applications. Police clearance certificates are also required from all countries where the temporary or permanent residence visa applicant has resided for more than a year since their 18th birthday.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Employees in South Africa may not be dismissed without cause as dismissals are required to be for a fair reason and effected pursuant to a fair procedure.

There are no requirements to notify government authorities of dismissals. In some instances, an employer must consult a trade union about pending dismissals, for example where the employee is a trade union representative or where union members are to be made redundant.

The grounds upon which an employer can fairly dismiss an employee are misconduct, incapacity (which can be in the form of medical incapacity or poor performance) and the operational requirements of the employer (i.e., redundancy, which is dealt with below in more detail). Dismissal may be summary where this is warranted (e.g., in cases of serious misconduct) but otherwise the employee must be given notice (the BCEA stipulates minimum notice periods of one week for employees with less than six months' service, two weeks for employees with service between six months and one year, and four weeks for employees with service over one year). Employers may pay their employees in lieu of notice.

An employee whose employment is fairly terminated for misconduct or poor performance is not entitled to any separation or severance pay. For the severance pay requirements in cases of redundancy, see subsection ii, below. It is possible for employers to conclude separation or settlement agreements with departing employees.

The employer is obliged to notify the Department of Home Affairs upon discontinuation of the employment of a work visa holder.

ii Redundancies

An employee may be dismissed for a reason relating to the employer's 'operational requirements', namely, requirements based on the employer's economic, technological, structural or similar needs. A dismissal based on operational requirements must be both procedurally and substantively fair, as is the case with any other dismissal in South Africa.

The process that must be followed when considering dismissals for operational reasons is set forth in Section 189 and 189A of the LRA. The basic Section 189 provisions apply to all retrenchments and Section 189A imposes additional procedural requirements, where large businesses conduct large-scale retrenchments. An employer is a large employer if it employs 50 or more employees.

Section 189 requires consultation with the employees who may be affected or their representatives (e.g., trade union, workplace forum) on the proposed retrenchments. There is no requirement to notify a works council or the government.

The employer must commence the consultation process as soon as it contemplates retrenchments. The employer must consult on ways to avoid retrenchment, to minimise the number of retrenchments, to change the timing of retrenchments, to mitigate the hardships caused to employees who are retrenched, to select the employees to be retrenched, and on severance pay. Consultation must commence with the employer issuing a written notice inviting the other party to consult and disclosing relevant information to enable the other consulting party to engage in the consultation process. Facilitation is an additional process available to the parties to a large-scale retrenchment on request. Facilitation occurs alongside the normal consultation process and is essentially consultation with the assistance of a commissioner appointed by the CCMA. The facilitator's job is to help the parties with their discussions and their attempts to reach agreement on as many issues as possible in relation to the proposed retrenchment.

If the employer falls under a bargaining council, it is advisable to check whether or not the bargaining council agreement has any special provisions relating to retrenchment with which it must comply.

No social plan is required but as part of its duty to avoid retrenchment wherever possible the employer must explore alternatives to retrenchment. Where the employer has alternative work that an affected employee can do (even if some training is required), the employer should accommodate the affected employee. The employer must also consult about the method of selecting employees to be retrenched and in the absence of agreed criteria must adopt fair and objective criteria. There is no category of employee protected by law from retrenchment where genuine operational requirements exist.

There are statutory rights to severance pay for retrenched employees. An employer must pay an employee dismissed for operational requirements severance pay equal to at least one week's remuneration for each completed year of continued service with that employer. Where the employer and employee have agreed, in advance or otherwise, to a higher amount of

severance pay, the rights under the agreement are unaffected by the lower statutory minimum. Employees who unreasonably refuse offers of alternative employment with the retrenching employer, or any other employer, are not entitled to severance pay.

The employer must consult about the possibility of rehiring retrenched employees if business picks up or if it is later considering hiring people for the sort of work that the retrenched employee performed. Usually the parties agree on how long the rehiring arrangement will apply and make it subject to the employees remaining contactable.

Employers may conclude settlement agreements with retrenched employees that entail a release of claims from the former employee.

XIII TRANSFER OF BUSINESS

In terms of Section 197 of the LRA, if a transfer of a business takes place, unless otherwise agreed, the new employer is automatically substituted in place of the old employer in respect of all employment contracts in existence immediately before the date of transfer and all rights and obligations between the old employer and an employee at the time of the transfer continue to be in force, as if they had been rights and obligations between the new employer and the employee.

Various statutory requirements must be met in order for a transaction to fall within the ambit of Section 197 of the LRA. Whether this Section applies to a specific transaction, depends on the following:

a the relevant business transaction must be a 'transfer' envisaged by Section 197 (which means that the business must be transferred as a 'going concern'); and

b the entity being transferred must be a 'business' (which is defined to include a part of a business, a trade, an undertaking or a service).

The test for whether or not there is a going-concern transfer is an objective one, where the substance of the transaction is considered, rather than its form. The courts have formulated a test that involves taking a 'snapshot' of the entity before the transaction and assessing its components. This is then compared with a snapshot picture of the business after the transaction is concluded to establish whether it is essentially the same business but in different hands. There is, however, no inflexible test and each transaction is considered on its own merits.

The buyer of the transferred business (the new employer), must provide employees with terms and conditions that are generally not less favourable than those that applied before the transfer. However, the buyer can transfer employees to different retirement plans or similar schemes. Employees cannot be dismissed because of the transfer of a business or any reason related to the transfer.[10] A dismissal that breaches this provision is automatically unfair.

It is possible to contract out of the provisions of Section 197 but only if the requirements of Section 197(6) are met. This means that the employers must negotiate with the same body that would have had to be consulted in the event of a retrenchment and must make full disclosure of all relevant information during the negotiation process.

Work visas are employer and position specific, and a work visa holder may not continue working on the existing work visa but must apply for an amendment to the visa to authorise work for the new employer.

10 Section 187(1)(g) of the LRA.

XIV OUTLOOK

The Employment Equity Amendment Bill 2018 (the Bill), as well as proposed amendments to the Employment Equity Regulations (the Proposed Regulations), aim to rectify the staggered pace at which transformation is currently taking place within South Africa. Two of the most important proposed amendments to the EEA are aimed at enhancing the efficacy of the affirmative action provisions found in Chapter III, while the other deals with the important issue of medical testing.

Section 53 of the EEA, as presently formulated, provides that every employer 'that makes an offer to conclude an agreement with an organ of state for the furnishing of supplies or services' to that organ of state, or makes an offer for the letting or hiring of anything, must:

a if that employer is not a designated employer, comply with the provisions of Chapter II of the EEA (i.e., must not unfairly discriminate against employees);

b if that employer is a designated employer, comply with Chapters II and III of the EEA, the latter chapter dealing with affirmative action.

It is further provided that employers that seek to make an offer as described above must attach a certificate to the offer, issued by the Department of Labour, confirming that the employer has complied with the relevant chapter or chapters of the EEA. Alternatively, the employer may attach a declaration to the offer stating that it complies with the provision of the relevant chapter or chapters. Failure to comply with these requirements is sufficient ground for rejecting any offer made by an employer.

Section 53 has not been brought into effect. The reason given in the Executive Summary as to why this Section was not initially brought into effect was that employers needed time to put processes and systems in place in order to comply with the law. However, the slow pace of transformation has meant that it has become necessary to strengthen enforcement mechanisms.

The Executive Summary envisages that an amended Section 53 will be brought into effect. The proposed amendment removes the possibility of an employer attaching a declaration to the offer to do business with the organ of state. More importantly the Department of Labour will only issue certificates of compliance if the employer:

a has met any applicable sectoral targets, or has provided reasonable grounds justifying non-compliance;

b has submitted its Employment Equity Report to the Department of Labour; and

c has not been found by the Commission for Conciliation, Mediation and Arbitration or a court to have, within the previous 12 months, breached the prohibition on unfair discrimination or has failed to pay the national minimum wage.

In terms of the Proposed Regulations, these certificates will be valid for a period of 12 months from the date on which they are issued. This is a significant proposed amendment with important ramifications for employers.

It is further envisaged that the definition of 'designated employers' will be amended. Currently, employers who employ fewer than 50 employees, but generate in excess of an annual turnover threshold, are defined as designated employers. The proposed amendments suggest that employers who employ fewer than 50 employees will no longer be designated employers, regardless of the annual turnover they generate. Currently, employers who do not fall within the definition of designated employers are permitted to give notice to the Department of Labour, indicating their willingness to comply with the EEA and the reporting

provisions therein. It is envisaged that this section will be repealed. This may be an attempt to limit the workload of the Department of Labour and also to eliminate the burden placed on smaller employers when complying with Chapter III of the EEA.

Section 8 of the EEA, in its current form, provides that employers are only be able to use psychological testing if the test:

a has been shown to be scientifically valid and reliable;
b can be applied fairly to all employees;
c is not biased against any employee or group; and
d has been certified by the Health Professions Council of South Africa (HPCSA).

In the matter of *Association of Test Publishers of South Africa v. the President of the Republic of South Africa*, the association launched an application to have the requirement that psychological tests must be certified by the HPCSA declared null and void. The basis of that argument was that there was no regulatory structure within the HPCSA that provided for objective certification of tests. As such, none of the psychological testing that is available could be used by employers, given that none of these tests had been or could be certified by the HPCSA. The High Court accordingly found that the requirement that tests must be certified by the HPCSA before they could be used by employers was null and void. Accordingly, the Bill proposes the removal of the requirement of Section 8(d) of the EEA, and as such, employers would be able to use psychological testing if the remaining requirements of that section are complied with.

At this stage, the Bill and the Proposed Regulations are still in the early stages of the legislative process and it is unlikely that they will be enacted in their current form. However, it is clear that there is a legislative drive to more strictly ensure and enforce transformation in South African workplaces, particularly given the slow pace of transformation in the past 20 years. This will significantly influence the labour and employment sphere.

The Draft White Paper on International Migration in South Africa was approved by the Cabinet in March 2017.

The White Paper recommended strategic interventions in eight policy areas: admissions and departures; residency and naturalisation; migrants with skills and capital; ties with South African expatriates; international migration within the African context; asylum seekers and refugees; integration process for international migrants; and enforcement.

At a press briefing on 25 September 2018, former Department of Home Affairs Minister, Malusi Gigaba, confirmed that the Department will relax the rules on travelling minors who are foreign nationals (mainly owing to its negative impact on tourism). The details of eased requirements for foreign minors travelling to South Africa were meant to have been settled in an international travel advisory that was due to be gazetted before the end of October 2018, after consultation with the Immigration Advisory Board. The travel advisory has, to date, not been issued. Nonetheless, the Department has confirmed that the amendments, when effected, will mean that parents of foreign minors will not be forced to carry parental consent documentation and unabridged birth certificates when travelling to South Africa. Instead, foreign travellers are 'strongly advised to carry these documents' to prove kinship, as immigration officials will retain the discretion to insist on seeing these documents where it is deemed necessary or where a situation appears to pose high risk. It is proposed that foreigners no longer be refused entry if they do not have these documents, but will instead be allowed the opportunity to prove parental ties and consent.

Appendix 1

ABOUT THE AUTHORS

STUART HARRISON

ENSafrica

Stuart Harrison is a director at ENSafrica in the employment law department. He specialises in all aspects of employment law, including executive appointments and dismissals, disciplining employees involved in procurement irregularities and who contravene the Public Finance Management Act, as well as restraint of trade matters.

He has acted and appeared for clients in various litigious matters in the labour courts, High Court and the Commission for Conciliation, Mediation and Arbitration, and he has conducted extensive eviction litigation in the Land Claims Court.

Stuart's experience includes drafting split employment contracts for employees rendering services in multiple jurisdictions, litigation against former executives for the recovery of unauthorised expenditure incurred in breach of fiduciary duties, test case litigation on second generation outsourcing, drafting agreements for clients with labour brokers, and preparing and revising constitutions for employers' organisations and bargaining councils. He also has experience in drafting bargaining council main agreements, dealing with the eviction of dismissed employees and other occupiers under the onerous security of tenure legislation and litigating on discrimination law. He has also worked extensively on issues around restructuring in the public sector and the employment law consequences relating to mergers and acquisitions. He has extensive advisory experience, having assisted in dealing with disciplinary, poor performance, absenteeism and other forms of incapacity matters and rooting out theft rings operating within workforces, as well as successfully running large-scale retrenchment exercises for employers. He also has experience in employee benefits and pension law.

He is the author of the chapter on pension law in Juta's annual labour law publication. He is the co-author of chapters on South African labour law for a number of international comparative employment law publications, such as the *Littler Mendelson Guide to International Employment and Labour Law*, Law Business Research's *The Employment Law Review* and the Centre for International Legal Studies' *International Employment Law* publication. He has also contributed to *Labour Law for Managers: A Practical Handbook*. He has served as an independent trustee for commercial umbrella funds as well as pension, provident, preservation and retirement annuity funds. Stuart regularly presents at client seminars, training courses, workshops, and has been a speaker at various public seminars and conferences on numerous issues, including labour brokers, second generation outsourcing, white-collar crime, pension law and ensuring legal and tax compliance in employment contracts and policies.

BRIAN PATTERSON

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Brian Patterson is head of ENSafrica's employment department. He specialises in integrated employment solutions, international split employment contracts, global mobility, executive terminations, restructuring and retrenchments, transfers of business, employment equity and unfair discrimination, collective bargaining, employment-related pension law matters, and drafting and enforcement of restraint of trade agreements, as well as the law relating to confidentiality and privacy.

Brian has done extensive African employment law work and significant international employment law work in the United States and the United Kingdom, and for many overseas law firms. He is qualified in South Africa and the United Kingdom.

Brian has acted for numerous African and international clients, and has provided advice to corporate clients in most sectors, including the financial services, retail, hospitality/gaming, pharmaceutical, mining, metal engineering, ITC and chemical industries. He has also dealt with the South African aspects of restructuring/mergers of multinationals in respect of a number of jurisdictions.

In addition, Brian's experience includes giving tactical and strategic individual and collective employment law advice, and he has extensive litigious and corporate employment law experience. He also engages in alternative dispute resolution mechanisms when necessary.

Brian has been involved with some of the leading employment law cases reported in southern Africa since the inception of employment law, and he has personally argued many matters in the Labour Court and the Labour Appeal Court. Brian has also acted as a judge of the Labour Court and was an assessor of the Labour Appeal Court.

Brian is co-author of the South Africa chapter of the *International Labour and Employment Compliance Handbook* and *The Employment Law Review* and has contributed articles in many local and international publications.

He is a regular speaker on employment and labour law issues and has appeared on many television programmes over the years.

ZAHIDA EBRAHIM

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Zahida Ebrahim is a director in ENSafrica's dispute resolution department, and heads up the firm's immigration unit.

She offers an extensive range of immigration and civic services to individuals and multinational companies, including large corporates and top-tier South African and international companies, as well as to various business chambers and professional bodies.

Zahida's specialist immigration knowledge and experience enables her to offer an all-encompassing range of immigration and civic services, including relating to temporary and permanent residence applications; applications for waiver of regulatory requirements; applications to the South African Department of Trade and Industry, and the Department of Labour for immigration-related certifications; applications to the South African Qualifications Authority for evaluation of foreign tertiary qualifications; citizenship-related matters, including applications for naturalisation, determination of citizenship status and resumption of citizenship; liaison with the Department of Home Affairs and foreign missions; as well as compliance audits and due diligence investigations.

Zahida actively lobbies for immigration reform by preparing representations to the South African Department of Home Affairs on new and proposed legislative changes, including the amendments to South African immigration legislation in May 2014, where she advised various business chambers and professional bodies on their submissions to government. She previously served on a panel of specialist advisers to the Minister of Home Affairs.

In recognition of Zahida's expertise, she has been invited to speak at various immigration law seminars. This includes the American Immigration Lawyers Association (Las Vegas, 2016 and Maryland, 2015) and the International Bar Association's Nationality and Immigration Conference (London, 2015 and 2013).

Zahida has also contributed to a number of texts and publications, including a chapter on immigration issues for *Labour Law for Managers: A Practical Handbook*; the South Africa chapter in the *The Employment Law Review* and the *Getting the Deal Through: Labour and Employment*, *Global Mobility Handbook*, and Oxford University Press' *Corporate Immigration Guide*.

From a dispute resolution perspective, her experience includes advising on policy wording reviews, compliance with South African insurance legislation, insurance due diligence assessments, and High Court litigation relating to commercial and insurance disputes.

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